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SENSITIVE  
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E.O. 12958: N/A  
TAGS: [EWWT](#) [MARR](#) [MOPS](#) [PHSA](#) [PREL](#) [SO](#) [XA](#) [XW](#)  
SUBJECT: U.S. PROPOSAL FOR PIRACY MOU

SUMMARY  
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[1](#)1. (U) This an action request. Please see paragraphs 2 and  
[1](#)3. MOU text is provided SEPCOR.

ACTION REQUEST  
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[1](#)2. (SBU) Post is requested to demarche host government  
officials to pursue the following objectives:

-- Deliver the proposed Memorandum of Understanding (MOU)  
and the accompanying cover letter in an appropriate format.

-- Thank the GOK for its regional leadership role in  
counter-piracy efforts and its commitment to prosecuting  
piracy suspects interdicted off the coast of Somalia.

-- Extend appreciation for GOK willingness to enter into a  
MOU with United States.

-- Explain that the proposed MOU contains differences from  
the MOU concluded by the UK and Kenya, and that the  
accompanying cover note highlights those differences in  
detail.

-- Ask if Kenya would share the United States' interest in  
rapidly concluding the MOU to allow its signing at the  
inaugural meeting of the high-level Contact Group on Somali  
Piracy in New York, which is expected to take place on  
January 6-7, 2009.

-- Request that the GOK be prepared to provide comments and  
counter-proposals within one weeks' time, and suggest that a  
videoconference be scheduled through Embassy Nairobi to  
enable Department lawyers in Washington to participate in  
discussions.

COVER LETTER  
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[1](#)3. (SBU) Begin cover letter text.

As discussed by our respective delegations to the piracy  
conference in Nairobi last week, we are forwarding a draft  
Memorandum of Understanding (MOU) for your government's  
consideration. We would again like to stress our  
appreciation for the Government of Kenya's leadership on this  
critical issue, and its willingness to take on this important  
role in the fight against piracy off the coast of Somalia.

As you will see from the enclosed draft, we have used the  
elements of the UK-Kenya MOU as a starting point, but have  
incorporated language and elements from other instruments as  
well. Specifically, we have drawn upon MOUs and agreements  
that the United States has concluded with our allies in the  
Caribbean, with whom we cooperate on counter-narcotics and

maritime drug trafficking interdictions. Our goal was to anticipate and address in advance a few logistical and other practical issues that are likely to arise in the conduct of maritime-based law enforcement activities, so that our collective efforts in the fight against piracy can be as smooth as possible.

We hope that you will find these additional elements in our draft acceptable. For your convenience, we have added explanatory foot notes to the text and have summarized below the primary differences between the UK-Kenya MOU and the proposed draft:

#### 1. Additional Preambular References.

The draft makes specific references to what we believe are additional important international conventions and laws relevant to the fight against piracy, including the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; the International Convention Against the Taking of Hostage, 1979; the international Convention for the Suppression of the Financing of Terrorism, 1999; and the United Nations Convention against Transnational Organized Crime, 2000. Both the Republic of Kenya and the United States are party to these instruments.

The draft also refers to Resolution A.922 (22) of the Assembly of the International Maritime Organization, 29 November 2001, which adopted and set out in its annex the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships ("Code of Practice"). We believe that the code of Practice is a useful starting point for our respective governments as we develop operational parameters for the handling and coordination of evidence, witnesses, and pirates - keeping in mind that the most important task is to ensure that the investigation meets any procedural and evidentiary requirements that will be necessary under Kenyan law.

#### 1. Logistical and Practical Issues

The draft expressly addresses several practical issues, such as logistics and transit (Section 6) and medical and decedent affairs (Section 4), which we can expect will arise over the course of our respective operations. While we have no doubt that these issues could be mutually resolved without express terms in the MOU, our past experiences have taught us that reaching an understanding on these matters in advance can be useful. This draft includes the elements that we have agreed to with our allies in the counter-narcotics area, although we are of course open to alternative suggestions that you may have.

#### 1. Scope

The draft has a slightly broader scope than the UK-Kenya MOU in a few key respects.

A. The definition of "security force officials" (vice "UK forces") in Section 2(e) has been broadened so as to cover the possibility that pirates that have been detained by a third party state and transferred to U.S. forces could subsequently be delivered to Kenya for prosecution. While we do not know if such a circumstance would arise, we believed it was an important option for our governments to explore. The current draft contemplates that this would include personnel from all States conducting counter-piracy operations in the vicinity of Somalia pursuant to U.N. Security resolution. Personnel from other States would be included only by specific mutual agreement between our two governments.

B. The definition of "security force vessels and aircraft" in Section 2(f) has been similarly broadened, except that it would include those of third States only by agreement of our two governments.

C. Section 3(1) of the draft contemplates not only the

transfer of pirates that have been interdicted at sea, but also those that have been interdicted ashore in Somalia. This is an element that was not salient at the time your government concluded its MOU with the UK, since it predated the passage of UN Security Council Resolution 1851 (2008), which as you know expressly authorized activities ashore in Somalia. We look forward to discussing with you the scenarios under which the transfer of such persons for prosecution or temporary detention in Kenya would or would not be practicable.

1D. Section 3(3)(a) contemplates U.S. assistance not only in the securing of affidavits or witness statements (as does the corresponding provision in the Kenya-UK MOU) but also the facilitation of securing witnesses for trial. This includes not only U.S. personnel, but also non-government witnesses. We understand that this issue already has arisen in the current prosecution your government is handling, and we wish to make our intentions clear in this regard. This section also contemplates facilitating obtaining other evidence held by the security force officials that may not have been included in the evidence package turned over at the time of transfer of the suspects.

1E. Section 5 addresses temporary detention ashore of those suspected pirates that Kenya does not intend to investigate, pending their transfer to another country for investigation and prosecution.

1F. Section 6 is designed to facilitate the timely transfer ashore to Kenyan authorities of suspected pirates and subsequent transfer to another country. We look forward to learning if that can be done without using the extradition process.

1G. Section 7 seeks to identify points of contact for requests and other communications related to implementation of the MOU. We look forward to deciding how best that may be accomplished.

1H. We thank you again for your Government's willingness to work with the United States in the fight against piracy off the coast of Somalia. We look forward to your comments on this draft. We would suggest that a teleconference or videoconference be scheduled in approximately a week's time to discuss the draft and address any changes that your government may wish to propose. As always, however, we would welcome any comments or questions you may have at any time. End cover letter text.

#### BACKGROUND

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15. (SBU) At the UN/Kenya International Conference on Piracy around Somalia held in Nairobi on December 10-11 2008, the GOK expressed willingness to enter into a MOU with the United States concerning the transfer and prosecution of piracy suspects interdicted near Somalia. The GOK has already concluded a similar MOU with the United Kingdom and offered to use the text of that MOU as a point of departure for negotiations with the United States. Department is seeking to conclude the MOU prior to the first Contact Group on Somali Piracy meeting in New York.

#### REPORTING DEADLINE

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16. (U) Department greatly appreciates post's continued support and assistance. Department requests post deliver the demarche on Tuesday, December 23 and report results by December 26 via front-channel cable slugged to AF/RSA Jun Bando, AF/E Susan Driano, and L/UNA John Daley.

#### DEPARTMENT POINTS OF CONTACT

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17. (U) Please contact AF/RSA Jun Bando (BandoJ@state.gov or 202-647-5781), AF/E Susan Driano (DrianoS@state.gov or

202-647-8913), or L/UNA John Daley (DaleyJD@state.gov or 202-647-2508) for any necessary further background information or supporting argumentation to meet demarche objectives.

RICE